issue.

Q. And what exhibit are you referring to?

A. The two exhibits -- one exhibit that Mr. Payne just introduced and the exhibit that you introduced as well relative to the floor plan. I think it's Exhibit --

MR. PAYNE: I think it's Exhibit 17.

THE WITNESS: 17?

Q. (By Mr. Gordon) I see.

A. There are dates on that exhibit and that would coincide of when I became aware of that issue.

Q. Okay. Were you aware of the request from the tenant to obtain some written verification from the city confirming that this space was compliant?

A. No. I was not aware of that until I heard it yesterday.

Q. Okay. Fair enough. Now, in -- you've indicated that the back alleyway is a public way, correct?

A. May I try to give some foundation for that to answer your question?

Q. Yes. If you need to clarify, that's fine.

A. If that's all right. It is a public way but the property actually is owned by Mr. Tozier. It was part of the -- now, I don't know that. I have to

back up. I don't know that that's the case.

It is a public way and I do know that it is privately owned. It is full of utilities. All of those utilities were there before the Gateway ever started because all of the buildings to the west of that -- of the right-of-way were built prior to the Gateway being built.

Q. And you were aware of their existence when you were drawing in 1994?

A. Correct.

Q. Can you pull out Number 7, Exhibit Number 7?

A. Okay.

Q. If you can look down on -- it's marked on the bottom of the first page, public way.

A. Uh-huh (affirmative). I see it.

Q. Can you, please, read that for me?

A. You bet. Public way, any street, alley or similar parcel of land essentially unobstructed from the ground to sky which is deeded, dedicated or otherwise permanently appropriated to the public for the public use and having a fair width of not less than ten feet.

Q. And if you can now pull -- I just had it, I've got a lot of exhibits here -- what is marked as

Exhibit Number 6. And --

A. The last page where he refers to ten feet?

Q. Yes. Well, it would be --

A. Next to the last page.

Q. I'm just going to refer to the picture -- the picture on point number 3, it's the picture that says exit stairs and power box constrict exit court width. Okay?

A. Yes.

Q. Now, if this is indeed a public way, is it your testimony that -- well, does this represent an accurate condition of the alleyway presently?

A. It shows that condition in one direction only. The alleyway goes all the way through.

Q. If you'll turn back one page, there's another picture that shoots back the other direction, the bottom one. Does that -- and you agree that shows an accurate depiction of what this alleyway looks like presently?

A. It does.

Q. And if it's a public way, it would require ten feet ground to sky with clear width of ten feet, correct?

A. Correct.

Q. And that alleyway does not comply with

that, correct?

A. It does not.

Q. Thank you.

MR. GORDON: Let's see if I've missed anything.

No further questions, Your Honor.

THE COURT: Any redirect, Mr. Payne?

MR. PAYNE: Just a little bit, Your Honor.

## REDIRECT EXAMINATION

BY MR. PAYNE:

Q. Mr. Cooper, the alleyway that you just were discussing that is less than ten feet wide, was that in existence prior to the time that the Gateway Center was built on top of the preexisting parking structure?

A. Yes. Everything in that photograph -- in both of those photographs I just commented on existed, with the exception of one stair, prior to the Gateway and are owned and operated by people other than Gateway.

Q. Okay. And when the Gateway building was constructed, did Park City require any conditions with respect to widening that space, that alleyway?

A. They did not. The discussion was that

there are two means of egress out of the alley, that the obstructions were controlled by and maintained by other property owners. I remember this discussion quite well, actually. And it was not under -- it was not required by us to move those utilities, exit stairs, et cetera, reconfigure it.

MR. PAYNE: No further questions.

THE COURT: You may step down, Mr. Cooper.

Did you have an appointment this afternoon, Mr. Gordon?

MR. GORDON: I'm okay.

THE COURT: Okay.

MR. GORDON: (Inaudible.)

MR. PAYNE: Your Honor, I would like to just briefly re-call Mr. Paul Piper for just one or two questions.

MR. GORDON: Your Honor, I would object to that. We were told that we were only going to deal with the expert today. And the reason I would be concerned about that is that obviously in this proceeding none of the witnesses have had the benefit of hearing one another's testimony. Mr. Piper was put on the stand yesterday. He did hear testimony and gave testimony. My clients did not have that same privilege of being able to go home and think

about it and come back on a redirect. And so I would object to re-calling him. As we closed yesterday, my understanding was we were only going to deal with the expert and then move forward.

THE COURT: What's the purpose for calling Mr. Piper?

MR. PAYNE: Your Honor, it's simple. Maybe we don't need to do it if we can get agreement of counsel.

There was some testimony yesterday that the post petition rent payments were current through the time that the lease was deemed rejected. And I think Mr. Piper was going to testify very briefly as to that. We just don't want to be bound on that issue with respect to a potential future administrative claim. If that's not going to be a part of --

THE COURT: Well, if I don't rule on -- the intent of my ruling yesterday when you raised the objection to the evidence regarding CAM charges that I didn't accept evidence on was that --

MR. PAYNE: Right.

THE COURT: -- this hearing wasn't going to address the issue of the amount of lease payments or whether lease payments were current, so --

MR. PAYNE: Okay.

THE COURT: And I'll tell you whatever ruling I'll make, and I'll make it clear on the record, that I intend to limit the ruling to the objection that was filed and -- consistent with my ruling yesterday, I don't think the objection that was filed put into issue the amount of the lease.

MR. PAYNE: Thank you. I just wanted to -- out of an abundance of caution on that point, but that -- we do not wish to call Mr. Piper.

THE COURT: All right.

MR. PAYNE: And that's -- that is all of the evidence that we have, Your Honor.

THE COURT: All right. The Court will take just a brief recess, maybe five minutes, and then oral argument.

MR. GORDON: Yes, Your Honor. Thank you.

THE COURT: Court is in recess.

THE CLERK: All arise.

(Recess.)

THE CLERK: All arise.

The court resumes its session.

Please be seated.

THE COURT: All right. Mr. Gordon.

MR. GORDON: Yes. Your Honor, the issue

before the Court today is whether the established safety code violations within the Gateway Center rise to the level of a breach of a warranty of inhabitability or a breach of the covenant of quiet enjoyment within the lease.

The evidence establishes the safety code -- that safety code violations exist within the building confirmed by Summit Engineering, Park City building department and the opposing side's expert.

The evidence shows that the landlord has been put on notice of the violations for many months and that little has been done to remediate them.

Testimony from Bill Shoaf establishes that his employees were pulled out of the space due to concerns for their safety and due to an unknown risk to assume the liability should a disaster occur.

The landlord argues that the violations are minor and that the tenant should be required to assume the liability for the violations.

The law does not require the tenant to do so and firmly establishes that the safety code violations that have gone unremediated constitute a breach of the lease.

It is critical that the Court understand that Gateway's allegations that Easy Street has

fabricated these claims to get out of the lease are false. The claims have been confirmed by Park City building department. The discovery of the problems was a natural progression stemming from the initial UOSH inspection.

When the city refused to put in writing that the space was compliant, it left the tenant with no choice but to vacate the premises to keep its employees safe.

The discovery of no building permit, which was being sought to get something in writing from the city that the space was safe, and the further discovery of no building plans raised additional questions.

The only thing on record was the parking garage plat, and that had obvious problems that led to the discovery of the items included in the Park City letter.

The question before the Court is this: Why should the tenant be forced to assume the liability and risk of these violations? Case law establishes that it should not be made to do so.

There are two theories under which this Court can hold that the lease has been breached. The first is a warranty -- a breach of the warranty of

inhabitability.

In Richard Barton Enterprises v. Tsern, which we have included in our brief, Your Honor, the Utah Supreme Court stated that in order to prove a breach of the warranty of inhabitability, the breach much be material or significant, defined as follows: Not minor, not temporary, must have an effect on the essential objectives of the lease, meaning it cannot have a peripheral effect, it must have a significant impact on the lessee.

In looking at that issue, in determining this, the Court must look at the purpose for which the lease was entered and determine if that purpose has been frustrated.

And the Court indicated that a good indicator of this is whether the breach reduces the value of the lease.

I will walk through that analysis, Your Honor.

The first, these violations are major. Case law establishes that in examining breaches of the warning of inhabitability safety is paramount.

In Wade v. Jobe, which we cited in our brief, it states: Substantial compliance with building and housing code standards will generally

serve as evidence of the fulfillment of the landlord's duty to provide habitable premises. Evidence of violations involving health and safety by contrast -- let me read that again. Evidence of violations involving health and safety by contrast will often sustain the tenant's claims.

Within that case the Court gives some examples of what it considers minor deficiencies stating malfunction of venetian blinds, minor water leaks or wall cracks or in need of paint.

You will note that the Court did not involve -- none of these minor deficiencies involve anything to do with safety, which the Court said was a different analysis.

And (inaudible) v. St. Peter, which was cited in the case, that states: In determining whether there has been a breach of the implied warranty of inhabitability, the courts may first look to any relevant local or municipal housing code. They may also make reference to the minimum housing code standards.

A substantial violation of an applicable housing code shall constitute prima facie evidence that there has been a breach of a warranty of inhabitability.

One or two minor violations standing alone -- and this part is critical -- which do not affect the health or safety of the tenant -- once again carving out this area of health and safety -- shall be considered de minimis and not a breach of the warranty.

There is no such thing, and case law establishes this, as a minor violation of a safety code. Why? Because every safety violation has a possibility of resulting in catastrophic result. The codes are absolute minimums. If you don't meet the code, it is, per se, unsafe.

What may seem like inches in a normal situation becomes a difference between serious injury and death in an emergency.

Just because the chance of -- the chance of injury is remote does not mean the violation is minor. It is the potential for injury that should be focused on. And in the analysis, the case law establishes that safety is paramount.

It should be noted that under the lease, Your Honor, the tenant is required to do any tenant improvements in accordance with all local codes. That's paragraph 10-A.

If the tenant improved its space not in

accordance with local codes, I don't think the landlord would deem this a minor violation. Why? Because that would -- they would not want to assume the potential liability of that violation.

And the same is true here for the landlord. How can anyone tell Easy Street that the possibility of severe injury to its employers -- or its employees is a minor thing?

Further evidence that these are not minor, Your Honor, is the Park City building department will require that all of these issues be fixed, meaning that the city -- meaning that to the city they are not minor either, they are going to require them to be fixed.

Moving to the next standard, Your Honor, the violations are not temporary. A temporary violation would be something like a loss of power, a flood, an atrocious smell, something that comes and goes. These violations are obviously not that.

The west exit stairway is built of concrete, and you've heard testimony, has existed for many, many years.

The back alleyway contains tripping hazards and a power box.

I don't think there's any dispute that

these are of a permanent nature.

The next level is do these affect the essential purpose of the lease?

The purpose of the lease was to operate an office. No one has been in area 2 for almost a year. You've heard testimony on that. And the rest of the space was -- of the employees was pulled out of area 1 back in November.

The questions about safety, Your Honor -- and you've heard testimony -- this is very important -- that my client was put in a no-win situation. They were asking for someone, please, to give them something from the city saying their space was compliant. And it's taken a full year to get that letter, and that did not come from the landlord.

The next step is significant impact on the tenant. Has this had -- have the violations had that?

And there's two parts under that. Has the purpose of the lease been frustrated?

Well, as stated above, they haven't been in the space, a portion of it for over a year and for all of it for the past four or five months. They haven't been able to use space at all entirely, you know, in frustrating it.

Has the breach affected the value of the lease?

The question here, Your Honor, is who in the world would lease this space knowing that it's noncompliant?

This lease at this point is unassignable based on the situation of that building. Until these issues get resolved, these would have to be disclosed. And so right now that lease has no value to my client. And that's one of the major determinations in trying to determine if a violation of the warranty of inhabitability has been -- has occurred.

Under the second theory, Your Honor, under breach of the covenant of quiet enjoyment, the lease does contain that covenant. And the covenant is basically stating that the landlord will not interfere with the proposed use of the tenant.

In Thirteenth versus Nelson -- that's also a case that we have cited in our brief, Your Honor -- it establishes that a failure to act constitutes a breach of the covenant. The failure to do some act or to adequately perform it may render a building just as untenable as affirmative interference.

It also states that we don't have to prove

an intent to oust. An attempt to evict may be implied whenever the landlord's conduct substantially deprives the tenant of the use of the premises.

We've also cited to the case (inaudible) v. Peoples National Bank of Washington in our brief, Your Honor. In this case there was a wall in the building that was unsafe, the landlord refused to fix. The Court stated that the lessor has a duty to make repairs when they are mandated by a public authority, which we have in this case.

Second, the Court said that even absent public authority, the landlord has a duty to maintain the premises in a manner that is safe for occupancy for both the tenant and its invitees.

The Court held that the failure to fix the wall was a violation of the covenant and constituted constructive eviction and therefore a breach of the covenant of quiet enjoyment.

Based on that analysis, Your Honor, the question is what did the landlord fail to do? It's really a failure to act that we are talking about here, which is a breach of this covenant.

The landlord has failed to fix the violations. And it's clear that they were put on notice and have been for many months and nothing has

been done.

They failed to approach the city over a year ago and obtain documentation confirming that the lease space was safe, which seems to be a simple thing and a simple request from tenant.

Both of these constitute a constructive eviction and thus a violation of the covenant of quiet enjoyment.

And you've also heard testimony that there were -- that the space was abandoned due to the failure to act.

I will close, Your Honor, in an analogy. I've thought a lot about this case. It's similar to -- if any of us went and bought a brand new car, Your Honor, with full written and implied warranties that the car meets safety standards. After a year of driving the car, we find out through a mechanic that the air bags are missing and that the antilock brakes haven't been installed properly and wouldn't potentially work in an emergency situation.

After knowing this, there's two questions: Is the car functional? Which I think is what the opposing side is going to argue. Yes, it's functional. Yes, it will get me around town.

Is it safe? Absolutely not. Don't hit

the brakes too hard because if you do, you're going to be in serious trouble.

The safety code violations are created, Your Honor, to protect against the worst case scenario. This is an issue about safety.

You wouldn't certainly keep driving the car once you knew about those types of violations. And you certainly wouldn't let people that you know drive the car.

My client was put in that same situation, and has been for the last year. He's been asking for certification from the city and never received it. Has been putting them on notice for months and months and nothing has occurred. He had no choice but to withdraw his people based on safety concerns that have proven to be legitimate.

Park City building department confirmed that these issues are real and that my client was wise in pulling his people out of the space when he did.

Based on that, Your Honor, we would submit that the evidence supports a finding that there has been a breach of both the warranty of inhabitability and the covenant of quiet enjoyment. And based on that, there is no further obligation under the lease

to pay rent.

MR. PAYNE: Your Honor, if it please the Court. This is an interesting case. There is a long history between the parties. But I don't believe it's quite as has been characterized by my opponent here today.

The notice that my client first received in writing from Mr. Gordon referred to one alleged safety violation. That was the 100-foot ingress, egress alleged violation. That was in April of 2009.

The testimony was -- from Mr. Shoaf himself, was that Arrin Holt of Mr. Cooper's architecture firm, another principal in that firm, physically measured that space a couple of different ways and one of the ways he measured it was -- where he did not take right angles but took a more natural course, and he indicated that it was less than 100 feet and that the space was compliant.

Notwithstanding that, the tenant for whatever reason wrote a letter to UDOT (sic), filed a complaint with UDOT (sic) asking them to find a violation. And they came back and said this isn't in UOSH's -- UOSH's purview.

They also -- it's also interesting that the testimony from Mr. Shoaf was that -- and what's

indicated in the reply brief, is that they became aware of problems with safety in the space, in this 100-foot ingress, egress as a result of the UOSH or OSHA inspection in the fall of 2008.

And the reply brief expressly states that -- on page 7 -- Partners would not have signed the lease had it known of the safety violations. Once the safety violations became apparent, coupled with Gateway's refusal to remedy the problem, Partners was trapped.

Well, that's simply not true at the time Partners signed the document legally obligating itself on the space. The inspection happened two or three months earlier.

Furthermore, if you look at the UOSH inspection, there's nothing in that inspection that expressly -- clearly refers to the space at issue here.

And furthermore, what was pointed out by the human resources director for Easy Street was simply a sign above an exit. There was nothing about 100 feet ingress and egress.

So it simply doesn't add up. And it does appear to be a case where they keep throwing things out trying to find an excuse, something that would

get them out of a lease, maybe help them in some negotiating position, is what it really appears to be.

In the fall of last year, Mr. Gordon sent a couple more letters to my client.

In September he sent a letter that, again, referred to the 100-foot ingress and egress. It also referred to ADA issues in connection with the parking garage. In October, another letter. 100 foot, ADA issues.

The ADA parking issue has been resolved.

Most of the issues that we've been dealing with the last couple of days here, Your Honor, are issues that were raised for the first time in a letter that Mr. Gordon sent in February of this year and to which he attached the Michael Johnston Summit Engineering report.

If I may point out, that is after the lease had been rejected by operation of law. They didn't take any action to try to reject this lease early. Instead, they let it go. And then after the proof of claim's filed, then we get this letter that says, oh, by the way, here are these other alleged violations.

I think the testimony and evidence shows

that nearly all of the matters raised -- if not all in Mr. Johnston's report, are not really violations.

Mr. Cooper testified and read sections from the building code indicating that as a general rule, modifications to prior building codes -- excuse me -- that modifications to existing structures do not require compliance with the current building code. They are basically a preexisting condition exclusion. And further, that if there's another change in building code subsequent that makes something less stringent and if the building complies with that, then that's all right. And that's what this case is with respect to the area of refuge.

So we do not believe there are any material, substantial building violations. And certainly if there were, the ones that are identified in the Johnston report, those were only made aware to my client -- those were made known to my client in late February after the lease had been deemed rejected, not while the debtor was occupying the space.

With respect to the debtor's occupancy of the space, Mr. Piper's testimony was they did not vacate the space. There were still people in all areas of the space up through January of this year.

The kitchen, conference room, were all in the area that was identified as area 2. And there were things stored in there as well. And the other part of the space was being actively used.

With respect to the 100-foot travel or path of egress, Your Honor, I think that the evidence is clear that right angles are not required. The comments to the building code themselves indicate a more natural path. That was something that was communicated. Mr. Shoaf admitted that he was told by the architects that that was how they measured and they believed the space was compliant. So that's really not an issue.

I think that the law on this point, Your Honor, is -- in Utah, does not justify them being excused from their obligations to pay rent under the lease.

In the Richard Barton Enterprises versus Tsern case, the Court there did recognize an implied covenant of inhabitability with respect to commercial leases.

However, the specific facts of that case were that in the lease itself, one of the expressed conditions was that the lessor, landlord, would repair an elevator that was essential to the tenant,

which was an antique dealer's operation, because they needed to take things up to the second floor that had a higher ceiling to store large items.

We do not believe that there's -- there's no evidence of any significant inducement in connection with this case that -- similar to that one.

With respect to safety issues, Your Honor, I think that the best evidence of that, besides Mr. Cooper's testimony, who is a very experienced architect, is in Exhibit 5 where -- even -- going through concerns here, and also noting that no notice of violations had been issued as of April 10th, Mr. Kurt Simister, who is the senior inspector for the Park City building department, says, in conclusion, I believe the space occupied by Mr. Shoaf is safe to occupy.

I believe the space occupied by Mr. Shoaf is safe to occupy.

This here is the public official whose job it is to enforce the code who says, well, there may be some violations, but it's safe.

Mr. Cooper's testimony was that many of the things here identified as violations are not because of this exclusion that -- that's (inaudible)

in the Utah Administrative Code -- that we pointed the Court to -- adopted in 2007 that says if it's a fully sprinkled building, it does not need an area of refuge.

And most of the items identified in the Johnston report and some of the items that are listed in this letter fall into that category.

But there is simply no evidence, Your Honor, or no credible evidence, we think, that there is a problem with safety in occupying this space. The Park City building inspector has weighed in and he's weighed in heavily to the contrary, Your Honor.

With respect to the covenant of quiet enjoyment and the constructive eviction, the case law we cite in our papers indicates that basically the tenant has to be driven out.

Here the claim is they were driven out because they thought that there was some violation, even though an architecture firm told them no problem. Even though the city would not say there was a problem. They pleaded with UOSH to tell them there was a problem, UOSH did not tell them that there was a problem. It said that's not our area.

And then they wait until after the lease is deemed rejected and come up with something and

say, oh, here we have these violations.

Well, number one, I think that the law typically requires that a landlord be given a reasonable opportunity to cure a defect, unless it's an extremely imminent health and safety hazard. And number two, this case is distinguishable from the other cases that are cited by them in their brief.

This is simply not a case where they've been deprived of the use of the space. The evidence is they have been using -- did use the space up through about the time that it was deemed rejected. And the evidence is also that there's just been a series of attempts to come up with alleged violations.

We think it's not well founded, we think the lease should be enforced according to its terms, and we ask the Court to overrule the objection to the claim.

THE COURT: Okay. Anything further?

MR. GORDON: No. I think we're good, Your Honor.

THE COURT: All right. I'm going to take a recess. It might be a few minutes, but I will be back.

MR. GORDON: Thank you, Your Honor.

THE CLERK: All arise.

(Recess.)

THE CLERK: All arise.

Court resumes its session.

Please be seated.

THE COURT: The matter before the Court is Easy Street Partners, LLC's objection to proofs of claim filed by Gateway Center, LLC.

The relief requested in the objection and the Court's ruling will be limited to this relief requested.

It's stated as follows: By this objection, Partners, A, objects to the initial Gateway claim which was amended and superseded by the Gateway claim and the Gateway claim on the ground that the landlord breached the implied warranty of habitability and the covenant of quiet enjoyment under the lease, and, B, seeks entry of an order disallowing and expunging the initial Gateway claim and the Gateway claim.

The basis for arguing that the landlord, Gateway, has breached the implied warranty of habitability and the covenant of quiet enjoyment is essentially code violations.

The issue of alleged code violations began

in approximately April of 2009 regarding a dispute over whether the premises had two divergent paths of egress within a 100-foot egress requirement.

That issue was raised again specifically in September of 2009. And at that time there was additionally an issue raised about noncompliance with certain ADA requirements in the parking premises.

Those same issues were raised again in October of 2009.

Most of the issues argued, which are code violations, were raised in a letter of February 2010 and were based on a report prepared by Michael Johnston dated January 13, 2010.

The Court notes that this date of this report and the date of Mr. Johnston's -- excuse me, the report and the letter of February postdate the deadline for the debtor to assume or reject leases and the lease had been rejected by operation of law.

The issues in dispute are raised by Mr. Johnston's -- in addition to the 100-foot issue is what I'll refer to it as, the egress issue, are raised in Mr. Johnston's report and relate to an east exit stairway and issues relating to the area of refuge there, pathway to the area of refuge in the parking level B-2, specifically with respect to a

four-inch-high curb requiring a ramp, a storage of trash or maintenance items in certain stairwells, and failure to have a two-way emergency communication system in an area of refuge. And with respect to the west exit stairway and exit discharge, that the stairwell landing and the width of the stairwell are noncompliant.

Mr. Johnston also raised an issue with respect to the exit court, concluding that the exit court was not with the -- did not comply with the required width.

Finally, Mr. Johnston raised -- well, not finally. He also raised an issue with adjacent buildings not fire rated. And then finally, certain access issues with respect to the central elevator and the exit corridor.

Based on his report and his opinion, Mr. Johnston concluded that these were code violations per the 1994 Uniform Building Code.

The similar issues were also addressed by Park City in a letter from Kurt Simister to Kim T. Solinger, which has been marked as Exhibit -- Debtor's Exhibit Number 5.

The landlord, Gateway, expert Mr. Cooper testified with respect to each of the issues raised

in Mr. Johnston's report and disagreed with the conclusions of Mr. Johnston, specifically with respect to the east exit stairway and the area of refuge.

Mr. Cooper testified that under the existing codes, this area of refuge is compliant because the building is -- has an automatic sprinkling system.

He acknowledged that the area -- the parking area on level B-2 with the four-inch-high curb should have a ramp.

The area of refuge and storage of materials have been remedied.

That the two-way emergency communication system is not required because the area of refuge is not required.

And testified that the west exit stairway and exit discharge were -- the original drawings were to provide for a 44-inch exit, but the stairway remains as originally constructed at 36 inches.

He testified that the exit court is not an exit court but is a public right-of-way and that the adjacent buildings are not fire rated -- that are not fire rated are not under the control of the debtor.

Finally, he testified that the issues

relating to the central elevator and exit corridors had been remedied.

The evidence is that there are conflicting expert reports.

The Court finds of particular value, given the conflict of the expert opinions, the letter from Park City dated April 8th, 2010, which is Exhibit Number 5.

First paragraph numbered 1 of that letter addresses the 100-foot egress issue.

Mr. Simister in that letter states that he personally measured the travel distance at 97 feet.

He further concluded that the 1994 Uniform Building Code limits travel distance through the area at 100 feet, that all tenants have access to one of the enclosed stairways that comply with this requirement.

He further noted that section 1003.4 allows 150-feet travel distance because the building has an automatic fire sprinkler system.

Based on this letter and the conflicting testimony of the experts, the Court cannot find that the building fails to comply. In fact, the evidence is that there is -- that the building does comply with respect to the 100-foot easement -- excuse me,

egress requirement.

The second matter raised in the Park City letter is the area of refuge on level 3 is obstructed, but knows that compliance can be achieved by changing the hinge side of the door.

Paragraph 3 of the Park City letter states that all areas of the refuge shown on the drawings require instructions with approved signage.

The drawings -- I assume, he's referring to the original drawings.

Paragraph 4, parking level B-2 has a step of four inches in height and that section 1001.4 requires a ramp.

Number 5, the area of refuge at parking level B-2 located within the enclosed stairs had storage that was in violation of the building codes and fire code but has been removed.

Number 6, the existing -- the exiting from the west stairway to the exterior of the building was not constructed as per the approved plans and shows the drawing showing a width of 44 inches and the constructed width is 36 inches.

Paragraph 7, the west exit area is not an exit court, which states that an exit court is bounded on three sides. The area is open to the --

on the north and south ends. The walk area must be maintained to eliminate any trip hazards that lead the public away -- excuse me, that lead to the public way.

Finally, the central elevators had handicapped parking. He reviewed the approved plan and the configuration of the parking stalls has been rearranged without building department approval. And that the parking is located as per the approved plans, the railing will not block the accessible route to the elevators.

Based on the expert opinion rendered by Mr. Cooper, there is, in his opinion, questions whether -- in fact, he believes there are no violations other than the ramp and the improper storage.

There was testimony regarding the west stairway exit.

The Court's conclusion from that evidence is that the building, the stairway exit was originally constructed in compliance with the 1982 code.

The drawings for the construction in 1994 indicated a 44-inch-wide stairway, which was not constructed, but it may not have been required to be

constructed.

Therefore, based on the evidence before it, the Court makes the following findings: There is no violation or code violation with respect to the 100-foot egress requirement. There is a question, and in Mr. Cooper's opinion the refuge -- area of refuge on level 3 is not a violation of the current code.

There has been no citation issued by Park City or any other public entity indicating or stating that this is not in compliance -- the area of refuge is not in compliance with the code.

The areas of refuge do not have signage as the drawings require. But, again, there is no formal citation other than an indication -- a general indication by Park City that they will be contacting the building owner to issue a notice of violations.

Parking level B-2 with the ramp appears to not be an issue in dispute, that there should be a ramp in that location.

The violation of improper storage has been remedied.

The issue with respect to the west stairway and the exit and the width of the exit is, at best, in dispute and there is no violation that --

citation that has been issued by Park City or any other public entity.

The Court concludes that the west exit area is not an exit court and that there is no violation with respect to the exit area.

The central elevators and handicapped parking, Mr. Cooper's testimony is that those issues have been remedied.

So in summary, the Court, number one, finds that there are no citations that have been issued by Park City.

The Court finds that the only possible violations -- well, I shouldn't say only possible, but the only reasonable violations based on the evidence are the area of refuge on level 3, the signage on the areas of refuge, the ramp on parking level B-2, and the issue respecting the width of the exit of the west stairway. So violations are limited to those four -- potential violations are limited to those four.

The -- I think I can -- I think those are my factual findings.

Now, the argument by the debtor is that the code violations rise to a level of the breach of implied warranty of habitability or the covenant of

quiet enjoyment.

Debtor's counsel noted in closing arguments that there is no building permit. The Court finds that is not the evidence. The evidence is that a building permit was requested but was not provided. That's not evidence that there is no building permit.

The violations -- the only violation that was raised prior to the rejection of this lease, which was a safety issue -- the ADA issue the Court finds is not a safety issue. So the ramp on the parking structure, on the four-inch step is -- I don't see how that's a safety issue.

The 100-foot egress alleged violation was raised, but the Court has found that there is no violation with respect to that alleged violation.

All of the other issues were raised after the debtor had vacated the premises and prior to any citations, prior to giving the landlord a reasonable opportunity to cure any of the violations.

And the debtor argues that the violations raise substantial or significant safety concerns.

The Court doesn't believe that the violations that it has identified that are the only remaining potential violations raise significant

safety concerns.

That fact is, in fact, borne out by Mr. Simister's conclusion where he states, I believe the space occupied by Mr. Shoaf is safe to occupy.

Debtor's argument asks this Court to essentially hold that any time a tenant can find or identify a code violation that raises a safety issue or a potential safety issue, that the tenant may essentially void the lease.

Any code violation poses a potential health or safety risk. That's why we have codes.

Mr. Cooper testified in his expert capacity -- and if it's not -- it may not be quite to the level of judicial notice, but it's not surprising that Mr. Cooper stated that any building has some code violations.

The other problem that the Court has with accepting the argument that these code violations -- alleged code violations allow the tenant to avoid the lease is that that position would clearly undermine the validity and parties' contracts to enter into lease agreements, not to mention that it is inconsistent with Utah law.

The cases cited by the debtor are clearly distinguishable from the present case. In the

Carlisle v. Morgan case, the city had taken action and actually had issued a notice of close to occupancy because of numerous health code violations, including plumbing leaks, cockroach and rodent infestations, unsafe stairs, missing windows, glass and smoke detectors.

In the Barton v. Tsern case, which the debtor cites and relies on, the remedy, assuming there had been breaches of the covenant of habitability, is not to void a lease but to give the landlord a reasonable opportunity to remedy those breaches. And if those are not remedied, an abatement of rent may be appropriate.

The Wade v. Jobe case states that a breach of warranty of habitability is not shown by evidence of minor deficiencies.

And while the debtor's argument is that these are major deficiencies, the Court finds that the only deficiencies with which the Court believes there is any remaining issue are minor.

And, secondly, the landlord was not given an opportunity to, number one, address any of these issues with the Park City building engineer and planning department, for example, arguing or at least asserting that the areas of refuge are compliant

under the 2006 code.

Therefore, based on the evidence before it and the applicable case law, the Court finds that there are not grounds for the Court to find that Gateway has breached the implied warranty of habitability and covenant of quiet enjoyment. And the objection to the claim with respect to that issue is overruled and denied.

The court is in recess.

THE CLERK: All arise.

(Concluded at 3:28 p.m.)

## REPORTER'S CERTIFICATE

STATE OF UTAH )
) ss.
COUNTY OF SALT LAKE )

I, Robin Conk, Registered Professional Reporter, do hereby certify:

That on August 19, 2010, I produced a transcript from electronic media at the request of Douglas Payne;

That the testimony of all speakers was reported in stenotype and thereafter transcribed, and that a full, true, and correct transcription of said testimony is set forth in the preceding pages, according to my ability to hear and understand the tape provided;

That the original transcript was sealed and delivered to Douglas Payne for safekeeping.

I further certify that I am not kin or otherwise associated with any of the parties to said cause of action and that I am not interested in the outcome thereof.

CERTIFIED this 19th day of August, 2010.

ROBIN CONK, RPR